

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CALIFORNIA INNOVATIONS, INC.,

05-CV-0539E(Sc)

Plaintiff,

MEMORANDUM

-vs-

and

ACCESS BAG N' PACK, INC. and
IGLOO PRODUCTS CORPORATION,

ORDER¹

Defendants.

INTRODUCTION

In this patent infringement action, Plaintiff California Innovations, Inc. alleges that the defendants have infringed several of its patents for soft-sided beverage coolers and have sold numerous products competing with Plaintiff's products using the infringed patents. Currently pending before the Court is Plaintiff's Motion for Default Judgment as to defendant Access Bag N' Pack ("Access").²

BACKGROUND

Plaintiff served a Summons and Complaint on Access by service on the New York State Secretary of State on November 3, 2005. Pursuant to Rule 12(a)(1)(A) of the Federal Rules of Civil Procedure ("FRCvP") Access should have filed its Answer to

¹This decision may be cited in whole or in any part.

²On May 31, 2006 the Court issued an Order to Show Cause directing Plaintiff to show cause why its action against Access should not be dismissed for failure to prosecute in light of Plaintiff's failure to take any action based on Access's failure to answer the Complaint. By filing the instant Motion for Default Judgment, Plaintiff has sufficiently shown cause its claims against Access should not be dismissed.

the Complaint within twenty days from the date on which it was served with the Complaint. Access failed to do so. In fact, Access has not responded to the Complaint to date. On June 22, 2006 the Clerk of the Court entered Access's default and Plaintiff filed the instant Motion for Default Judgment. Access's response to the Motion was to be filed on or before August 4, 2006. Access failed to respond to the Motion.

FACTS

Plaintiff alleges that it is the assignee of three valid and legally issued patents pertaining to the manufacture of soft-sided beverage coolers. The patents are: United States Patent No. 6,116,045 ("the '045 patent"), United States Patent No. 6,067,816 ("the '816 patent") and United States Patent No. 6,481,239 ("the '239 patent").³ Plaintiff alleges that Access has directly infringed and continues to infringe various claims within those three patents by the manufacture and sale in commerce of Access's soft-sided cooler model "46712."⁴ In the Complaint, Plaintiff seeks a declaration that Access has infringed the enumerated patents, an award of damages caused by the infringement, a permanent injunction against Access from further

³Plaintiff also alleges a fourth claim with respect to United States Patent No. 6,644,063 ("the '063 patent). As such claim relates solely to another defendant, however, the Court does not address that patent herein.

⁴Although Plaintiff has alleged that Access and the other defendants "made, used, sold, offered for sale, and/or imported goods, including but not limited to [Access] model "46712" ***" (Compl. ¶11), Plaintiff does not allege that Access has infringed the patents by any product other than model "46712."

infringing the enumerated patents, attorney's fees, costs and pre- and post-judgment interest.

On this Motion however, Plaintiff seeks the entry of a permanent injunction against Access and an Order for an accounting so that Plaintiff may obtain evidence as to the number of infringing products, if any, sold by Access and determine the amount of damages, if any, to which it is entitled.

DISCUSSION

FRCvP 55(b) provides that, unless Plaintiff's claim against the defaulting defendant is for a sum certain, Plaintiff must apply to the court for judgment by default. FRCvP 55(b) also states that "[i]f, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence, the court may conduct such hearings or order such references as it deems necessary and proper ***."

When a default judgment is entered, the defendant is deemed to have admitted all of the well-pleaded factual allegations in the complaint pertaining to liability. *See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992), cert. denied, 506 U.S. 1080 (1993). However, where as here the amount of damages is not readily ascertainable, a plaintiff must prove the amount of damages before a final default judgment can be entered. *See Au Bon Pain Corp. v. ArTECT, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981).

By its default, Access has admitted that Plaintiff is the assignee of the three enumerated patents and that Access has and continues to infringe those patents by the manufacture and/or sale of its model "46712" soft-sided cooler. Thus, by its default, Access has admitted that it has infringed Plaintiff's patents.

CONCLUSION

Accordingly, it is **ORDERED** that judgment by default is entered against Access with respect to liability on Plaintiff's infringement claims and that Access is enjoined from further acts of infringement with respect to the '045, '816 and '239 patents by its model number "46712"; and it is further

ORDERED that Plaintiff is entitled to an accounting of the sales of model "46712" in order to determine its damages, if any.

DATED: Buffalo, N.Y.
 March 30, 2007

/s/ John T. Elvin

JOHN T. ELFVIN
S.U.S.D.J.